

No. 43168-8-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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AMANDA STARR MOUNT,

Respondent/Cross-Appellant,

v.

JOHN MERRITT MOUNT,

Appellant/Cross-Respondent.

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REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT  
AMANDA STARR MOUNT

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A. INTRODUCTION

Amanda Starr Mount and John Merritt Mount<sup>1</sup> were granted a legal separation at the conclusion of a one day bench trial limited to the distribution of their assets and liabilities, and to maintenance. Merritt appealed, arguing for the most part that the trial court misapplied RCW 26.09.090 when awarding maintenance to Amanda. Amanda cross-appealed, arguing that the trial court abused its discretion by refusing to reconsider its attorney fee award based on Merritt's post-trial misconduct. She submits this reply in support of her cross-appeal.

Although Merritt quibbles with the nature of the issue presented in Amanda's cross-appeal, nowhere in his response does he identify any authority to support the trial court's decision to dodge its responsibilities by refusing to rule upon a matter entirely within its discretion. Merritt's effort to dance around the issue only serves to highlight the simple truth that the trial court avoided doing what it was tasked with doing. The trial court abused its discretion by failing to exercise its discretion. The Court should reverse the award of attorney fees to Amanda and direct the trial court on remand to increase the award based on Merritt's post-trial misconduct and the fees that Amanda incurred in defending against it.

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<sup>1</sup> The parties will be referred to by their familiar names to avoid confusion; no disrespect is intended.

B. ARGUMENT IN SUPPORT OF REPLY

(1) Standard of Review

As Amanda noted in her opening brief, this Court reviews a trial court's decision to deny reconsideration for an abuse of discretion. Br. of Resp't/Cross-Appellant at 30. Although Merritt does not explicitly address the proper standard of review in his response, he at least recognizes it when he claims that the trial court did not abuse its discretion by denying reconsideration. Br. of Appellant/Cross-Resp't at 22.

(2) The Trial Court Abused Its Discretion By Failing to Exercise Its Discretion

Amanda argued in her opening brief that the trial court abused its discretion by refusing to reconsider the amount of attorney fees and costs awarded to her because the parties had already appealed. Br. of Resp't/Cross-Appellant at 30-32. Merritt responds, arguing that the trial court did not abuse its discretion by failing to decide the issue. Br. of Appellant/Cross-Resp't at 22. He argues instead that the trial court denied the motion. *Id.* Not so. The trial court's memorandum decision reflects its unwillingness to decide the issue presented to it:

. . . it is the opinion of the undersigned that *regardless of what action this court takes, or does not take, the matter will be addressed at the Court of Appeals*. If it chooses to address the issue of attorney fees, the Court of Appeals will do so.

All of the above is provided by way of background and for the purpose of underscoring this court's belief that *it is time for the trial court level proceedings to be at an end, and the parties pursue their respective positions at the Court of Appeals*. It is for this reason that the court is declining at this time to further reconsider its ruling in any respect.

CP 278 (emphasis added).

Contrary to Merritt's assertions in his response at 21, a substantial change in circumstances occurred post-trial to justify an award of additional attorney fees and costs to Amanda. For example, Merritt refused to cooperate with the trial court's orders post-trial: he refused to pay maintenance and he did not provide Amanda with the liquid assets that she was awarded. CP 236, 263. Amanda incurred additional attorney fees and costs attempting to recover what she was awarded.

Moreover, the lengthy post-trial delay was entirely Merritt's fault. Amanda noted the presentation hearing, but agreed to continue it to accommodate opposing counsel's schedule. CP 195. That agreement resulted in a delay of more than one and one-half months since both of Merritt's attorneys insisted on being present for the hearing. *Id.* During the hearing on January 12, 2012, Amanda notified the trial court that she had not received a response from Merritt on the form of the final papers. *Id.* Merritt accused her of misinforming the court. *Id.* They spent the entire afternoon on the matter, but accomplished nothing. *Id.* It turns out

that while Merritt's counsel had prepared a response, *he served it on the wrong law firm. Id.* As a result, nothing was accomplished at the hearing and revised pleadings had to be prepared. CP 195-96, 236. More to the point, Merritt's counsel did not bother to raise the issue of the DWS Scudder account number until *after* the January hearing. CP 196.

Merritt argues that the trial court's award of fees was unwarranted because he had the right to ask for reconsideration. Br. of Appellant/Cross-Resp't at 21. Just because he was entitled to ask for reconsideration under CR 59 does not mean that he should have done so.

Where Merritt's post-trial motions and misconduct substantially increased Amanda's attorney fees and costs, she was entitled to an additional fee award. The trial court erred by refusing to decide the issue.

(3) Amanda is Entitled to Attorney Fees and Costs on Appeal

Amanda requested attorney fees and costs in her opening brief under RAP 18.1, RAP 18.9(a), and RCW 26.09.140. Br. of Resp't/Cross-Appellant at 22. Merritt responds, arguing that he did not commit misconduct where he asked the trial court to base its decision on the evidence rather than argument. Br. of Appellant/Cross-Resp't at 23. He also argues that Amanda is in a far better position to pay attorney fee and costs than he is. *Id.* He claims that if she had taken responsibility for her

own support, then this appeal would not have been necessary. Merritt is mistaken.

A careful assessment of Amanda's financial need, as will be described in her forthcoming RAP 18.1(c) affidavit, balanced against Merritt's ability to pay, firmly supports the conclusion that Amanda should recover her fees on appeal. RCW 26.09.140. That she may have received substantial property or maintenance does not prevent her from also receiving an award of attorney fees and costs where Merritt remains in a much better position to pay. *In re Marriage of Hadley*, 88 Wn.2d 649, 659, 565 P.2d 790 (1977).

Contrary to Merritt's assertion in his response at 23, *Amanda's* attorney fees would have been unnecessary if *Merritt* had met his financial obligations post-separation. He refused. Now, he seeks another "re-do" of the trial court's distributions and awards to maximize his share of the marital assets to Amanda's detriment. The Court should reject Merritt's self-serving exercise and award Amanda attorney fees and costs on appeal.


C. CONCLUSION

The trial court's decision not to decide Amanda's motion for reconsideration was not a proper exercise of discretion. The trial court abused its discretion by improperly shifting the responsibility for deciding the issue of trial court attorney fees to this Court. This Court should

reverse the trial court's decision on this issue and direct the trial court on remand to increase Amanda's fee award to account for Merritt's post-trial misconduct and the additional fees she incurred post-trial. Costs on appeal, including reasonable attorney fees, should be awarded to Amanda.

DATED this 25<sup>th</sup> day of February, 2013.

Respectfully submitted,



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DECLARATION OF SERVICE

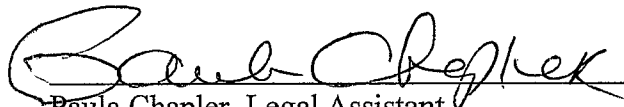
On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Reply Brief of Respondent/Cross-Appellant Amanda Starr Mount in Court of Appeals Cause No. 43168-8-II to the following parties:

Bertha B. Fitzer  
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Original sent by email for filing with:  
Court of Appeals, Division II  
Clerk's Office  
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 25, 2013, at Tukwila, Washington.

A handwritten signature in black ink, appearing to read "Paula Chapler", written over a horizontal line.

Paula Chapler, Legal Assistant  
Talmadge/Fitzpatrick

# TALMADGE FITZPATRICK LAW

**February 25, 2013 - 10:48 AM**

## Transmittal Letter

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